***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

# 76-1369

*To be argued by*
IRA H. BLOCK

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 76-1369**

UNITED STATES OF AMERICA,
*Appellee,*

—v.—

HUI SING SZE,
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR THE UNITED STATES OF AMERICA


ROBERT B. FISKE, JR.,
*United States Attorney for the Southern District of New York, Attorney for the United States of America.*

IRA H. BLOCK,
FREDRICK T. DAVIS,
*Assistant United States Attorneys, Of Counsel.*

## TABLE OF CONTENTS



### TABLE OF CASES

OTHER AUTHORITIES

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 76-1369**

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

HUI SING SZE,

*Defendant-Appellant.*

## BRIEF FOR THE UNITED STATES OF AMERICA

### Preliminary Statement

Hui Sing Sze appeals from an order of the Honorable Charles L. Brieant, Jr., entered in the United States District Court for the Southern District of New York on July 12, 1976, denying Sze's motion to withdraw his plea of guilty and to vacate his judgment of conviction with respect to Count One of Indictment 74 Cr. 1225.

The indictment was filed on December 31, 1974 in four counts. Count One charged Hui Sing Sze and four others named as defendants (Lee Louie, Tommy Chin, Edward Chow and Kenneth Lui) with conspiracy to commit bribery of public officials in violation of Title 18, United States Code, Sections 201(b) and 2, and to defraud the United States in connection with administration of the immigration laws. Counts Two through Four charged substantive violations of Section 201(b) relating to the offer and payment of sums by the defendants to

officials of the Immigration and Naturalization Service in return for the false and fraudulent procurement of Alien Registration Receipt Cards, commonly known as "green cards".

Sze pled guilty to Count One before Judge Brieant on March 21, 1975. On May 2, 1975, Sze was sentenced pursuant to 18 U.S.C. § 3651 to imprisonment for five years, three months of which were to be served in a jail-type institution with execution of the remainder suspended, and was placed on probation for the duration of the five years.

On May 21, 1976 Sze moved to vacate his conviction and withdraw his guilty plea. The motion was denied by Judge Brieant in a memorandum opinion filed July 12, 1976.

## Statement of Facts

### Arraignment and Pre-Trial Proceedings

Arraignment of Sze on the indictment was held in Part I of the District Court on January 6, 1975, at which time he pled not guilty and the case against Sze and his co-defendants was assigned to Judge Brieant for all purposes. (A. 1-2).* The Government's notice of readiness for trial was filed that same day. (A. 2).

Judge Brieant called an initial pre-trial conference on February 20, 1975. Sze, represented by counsel, was present, as were all of the co-defendants except Liu. However, because counsel for co-defendants Chin and Chow were not present, Judge Brieant, after announcing his intention to expedite trial of the case, adjourned the conference until March 11, 1975. On this adjourned date, Sze again appeared with counsel, as he likewise did on the next day, March 12, at which time he was represented by Stephen Singer, Esq. (A. 8).

---

* "A." refers to appellant's appendix.

## The Proceedings of March 21, 1975

Sze, again represented by Stephen Singer, Esq., appeared before Judge Brieant on March 21, 1975. Ellen Chu, an experienced court interpreter translator of the Chinese language, was also present. (A. 13). At this time Sze offered to plead guilty to Count One of the indictment, which charged a violation of the general conspiracy statute, 18 U.S.C. § 371. (A. 14).

In response to questions from the Court, Sze acknowledged through the interpreter that he had gone over the indictment with his attorneys; that the charge to which he was offering to plead guilty had been translated and satisfactorily explained to him in both English and Chinese; that he fully understood the charge; that he had fully discussed everything he knew about the case with his attorneys, and was satisfied with their representation of him. (A. 16-17). As Judge Brieant continued with the allocution and advised Sze that he was entitled to a speedy and public trial during which he would be presumed innocent until the Government established otherwise to the unanimous satisfaction of the jury, Sze acknowledged that he understood these rights and volunteered that he wanted to plead guilty. (A. 17). Likewise, Sze stated that he understood that Judge Brieant would have the power to sentence him to up to five years in prison as well as impose a fine of $10,000. (A. 19). When asked if he was pleading guilty because of any promises, statements or predictions that by doing so he would receive lenient treatment, after some initial confusion as to his answer—to be discussed in more detail below—Sze ultimately replied "No, I feel this way myself." (A. 20-21).

Concerning the factual basis for his plea of guilty to the conspiracy charge, Sze acknowledged—this time *in English* in response to the prosecutor's questions—that he

had introduced a friend of his named Pang Sing Ping to co-defendant Eddie Chow to enable Ping to arrange to purchase a "green card" from immigration officers. (A. 26-27). Upon hearing these acknowledgements, coupled with inculpatory statements by Sze in response to the Court's own questioning as well as representations by the Assistant United States Attorney as to what the Government proposed to prove at trial, Judge Brieant accepted Sze's plea. (A. 27).

## The Proceedings of May 2, 1975

Sze appeared before Judge Brieant for sentence on May 2, 1975, accompanied by Alan J. Stopek, Esq.* Mr. S. C. Szeto acted as interpreter. (A. 29).

When asked whether there was any reason why sentence should not then be imposed, both Sze and his counsel replied in the negative (A. 30), after which counsel for Sze presented information in mitigation of sentence. Queried if he wished to make any statement in his own behalf, Sze asked for leniency and for Judge Brieant to "do whatever your Honor could to help me, I hope not to separate me from my family and force me to leave the United States." (A. 34). In response to this plea by Sze not to be deported, Judge Brieant remarked:

> "I don't think there is anything the Court can do with respect to your Immigration status. In fact, I believe under these circumstances the Immigration regulations will have to be enforced in your case. . . ." (A. 34-35).

In addition, Judge Brieant incorporated into the record a portion of the pre-sentence report referring to the de-

---

* Messrs. Singer and Stopek are law partners. (A. 14).

portation proceedings already pending against Sze (A. 35) and inquired of a representative of the Immigration and Naturalization Service who was present in the courtroom as to how soon after termination of the criminal case deportation could be effected. (A. 36).

After some further discussion concerning Sze's immigration status, Judge Brieant pronounced sentence, specifying as a special condition of the term of probation to follow Sze's three month period of confinement that Sze "comply with all lawful and final orders of the Immigration and Naturalization Service." (A. 38).

## The Motion To Withdraw Sze's Guilty Plea and Vacate His Conviction

By notice of motion dated May 21, 1976—14 months after he pled guilty, more than a year after sentence was imposed and nearly as long after Sze's release from confinement—Hui Sing Sze moved to withdraw his plea of guilty to the conspiracy count of the indictment, to vacate the judgment of conviction entered thereon and for a stay of deportation, which was then scheduled for no later than June 3, 1976. (A. 48). The motion was supported by two affidavits, one by newly retained counsel (A. 40-48) and one by Sze himself. (A. 49-52). The Sze affidavit was written in the English language.

In his motion papers,* Sze contended that all of the proceedings theretofore had in the case were null and void on the ground that he was denied effective assistance of counsel because his prior attorneys did not speak Chinese, as does Sze, and on the further ground that his plea

---

* No memorandum of law was submitted in support of the motion as required by Rule 9(b) of the General Rules of the United States District Court for the Southern District of New York.

of guilty was involuntary because of claimed erroneous advice by his counsel concerning the possibilities of a prison term being imposed on his plea of guilty or deportation arising from his conviction. (A. 40-41). He also alleged that the record of the March 21, 1975 plea proceedings before Judge Brieant was fatally defective, incomplete, and in violation of his due process rights because the stenographic minutes were transcribed in English but not in Chinese. (A. 41).

## Judge Brieant's July 9, 1976 Decision

In a memorandum decision, dated July 9, 1976, and filed on July 12, 1976, Judge Brieant denied Sze's motion. The request for an order staying the order of deportation outstanding against Sze was "denied without prejudice to application for such relief in a plenary proceeding brought to review any determinations which the Immigration & Naturalization Service may have made." (A. 12).

Judge Brieant observed in his decision that Sze had failed to sustain his burden of showing "manifest injustice" under Rule 32(d) of the Federal Rules of Criminal Procedure and that the motion was frivolous, and further found that there was sufficient information in the transcripts of the March 21, 1975 and May 2, 1975 proceedings to warrant denying the motion without hearing * in the absence of any contrary showing of evidentiary facts by Sze. (A. 7, 12).

This appeal followed.

---

* At oral argument of the motion, held on June 18, 1976, counsel for Sze had agreed that resolution of the issues presented by Sze's motion did not require Judge Brieant to conduct an evidentiary hearing.

# ARGUMENT

## POINT I

### The District Court properly denied Sze's motion.

The only issue presented by this appeal is whether Judge Brieant abused his discretion in denying Sze's motion to withdraw his guilty plea. Whereas in the District Court Sze complained of ineffective assistance of counsel and abridgement of his constitutional rights owing to the absence of a stenographic record in Chinese of the proceedings in his case, as we understand his argument to this Court he now urges only that Judge Brieant failed to comply with Fed.R.Crim.P. 11 in accepting Sze's plea and entering judgment thereon, and that the plea itself was not knowing and voluntary due to allegedly inadequate interpreter services. As we shall demonstrate, the requirements of Rule 11 were in all respects followed by Judge Brieant before accepting Sze's guilty plea, and the interpreter services provided when the plea was entered were more than sufficient to enable Sze to understand and participate voluntarily in the proceedings.

### A. There was no violation of Rule 11 in accepting Sze's plea of guilty.

Rule 11(c) of the Federal Rules of Criminal Procedure in its present form requires that before accepting a guilty plea the court must personally address the defendant and inform him of or determine that he understands: the nature of the charge to which the plea is offered; the mandatory minimum penalty provided by law, if any, and the maximum penalty provided by law; that he has the right to plead not guilty; a right to be tried by a jury; the right to an attorney; and that by pleading guilty he

has waived his right to a trial. Under Rule 11(d) the court is required to inquire, by addressing the defendant personally in open court, whether the plea is voluntary and not the result of force, threats or promises apart from a plea agreement or pursuant to discussions between the defendant or his attorney and the attorney for the Government.*

Sze alleges that his guilty plea did not conform to these requirements because his answers to Judge Brieant's questions revealed that his plea was based upon undisclosed and unfulfilled promises to the effect that he would not receive a custodial sentence and would not be deported. Additionally, Sze urges that his plea is invalid because he did not believe himself guilty and his responses to Judge Brieant's questioning concerning the factual basis for the plea constituted a denial of each and every element of the crime of conspiracy to commit bribery with which he was charged. However, as Judge Brieant found in his carefully considered memorandum opinion, the transcript of the plea proceedings refutes each of these arguments.

When the Court first inquired if Sze had been induced to plead guilty by reason of any promises, statements or predictions that such course would result in leni-

---

* At the time the plea was entered in this case, these requirements were not explicitly set forth in the text of Rule 11, though they had been imposed, in part, through appellate gloss thereon. *See, e.g., Jones* v. *United States*, 440 F.2d 466, 468 (2d Cir. 1971).

Prior to its amendment effective December 1, 1975, Rule 11 read in pertinent part as follows:

> "The court may refuse to accept a plea of guilty, and shall not accept such plea . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

ency, special treatment or consideration, the transcript reveals that Sze initially replied, through the interpreter, "Yes." (A. 19-20). In an effort to clarify the matter, Judge Brieant then inquired further as follows:

> "Q. I asked you a moment ago, had you been induced to offer to plead guilty by reason of any promises. I don't think I heard your answer. Are you pleading guilty because you believe you are guilty or because of some promise or statement or prediction made to you by somebody?
>
> THE INTERPRETER: He says no.
>
> THE COURT: I thought he might have said yes. It wasn't clear to me what he said.
>
> MR. KURIANSKY: I thought I heard yes, too. He may have been answering whether or not he understood what you said. I'm not sure.
>
> Q. Have you been induced to offer to plead guilty by reason of any promises, statements or predictions by anyone to the effect you would get leniency or special treatment or special consideration if you plead guilty instead of going to trial?
>
> THE INTERPRETER: The lawyer explained it to him.
>
> Q. Are you pleading guilty because you believe you are guilty or are you pleading guilty because somebody made a promise or statement or prediction to you that you would get leniency or special treatment or consideration if you pleaded guilty instead of going to trial? Which is it?
>
> A. No. I feel this way myself.
>
> Q. Are you pleading guilty solely because you believe you are guilty?
>
> A. Yes." (A. 20-21).

In light of the subsequent clarification set forth above of the affirmative response to Judge Brieant's initial question on the subject of inducements, it simply is not accurate to say, as does Sze in his brief (p. 5), that the transcript of the March 21 plea proceedings shows "clearly and unquestionably an affirmation by the defendant-appellant that he had been induced to plead guilty as a result of undisclosed promises." Rather, read as a whole the plea minutes reveal full and complete compliance with Rule 11 in its then existing form and fully demonstrate that Sze's plea was voluntary.

The transcript of the March 21 proceeding also discloses that Judge Brieant advised Sze, and Sze acknowledged that he understood, the rights he waived by pleading guilty (A. 17-18) and the maximum penalty which could be imposed if his plea was accepted. (A. 19). In addition, Judge Brieant ascertained that Sze had discussed the charges in the indictment with his attorneys, that the indictment had been translated into Chinese to his satisfaction, that he understood the charges and had disclosed everything he knew about the case to his privately retained attorneys and was satisfied with their representation of him. (A. 16-17). The Court also determined that Sze was in good health (A. 16), not under the influence of narcotics or alcohol (A. 16) and was not pleading guilty because of any threats, force or coercion. (A. 20).

In effect, Sze contends that Judge Brieant's decision should be reversed simply because in his after-the-fact moving affidavit Sze conveniently proclaimed that he "did not want to plead guilty" and that his then attorney had informed him he would not have to go to jail if he pleaded guilty and that a guilty plea would not adversely affect his then immigration status as an alien illegally present in the United States. (A. 49-50). Although the veracity of these belated and self-serving claims were plainly be-

lied by Sze's failure to seek relief from his plea when he appeared for sentence on May 2, 1975—or within any reasonable period of time thereafter, even crediting these statements as true, the District Court properly rejected the claims as an insufficient basis for the relief sought without holding an evidentiary hearing.* It is well settled that where a defendant's belief that he will receive leniency results from an erroneous sentence estimate offered by his defense counsel, the guilty plea induced by such belief is not involuntary and will not be set aside. *E.g., Seiller* v. *United States*, Dkt. No. 75-2002 (2d Cir., December 1, 1975), Slip op. 6509, 6537; *United States ex rel. Hill* v. *Ternullo*, 510 F.2d 844, 847 (2d Cir. 1975); *Mosher* v. *LaVallee*, 351 F. Supp. 1101 (S.D.N.Y. 1972), *aff'd*, 491 F.2d 1346 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974); *United States ex rel. Scott* v. *Mancusi*, 429 F.2d 104, 108 (2d Cir.), *cert. denied*, 402 U.S. 909 (1971); *United States ex rel. Bullock* v. *Warden*, 408 F.2d 1326, 1330 (2d Cir. 1969), *cert. denied*, 396 U.S. 1043 (1970). *Cf. United States* v. *Rich*, 516 F.2d 861 (2d Cir. 1975). This is particularly true where, as here, the defendant responded in the negative to an inquiry in open court as to whether "there were any promises or understandings regarding his plea," *United States* v. *Rich*, *supra*, 516 F.2d at 862, and where the claim is made only belatedly. *Seiller* v. *United States*, *supra*, Slip op. at 6536.**

Concerning Sze's claim that he was erroneously advised regarding the effect of his guilty plea upon his immigration status, this Court's decision in *Michel* v. *United States*, 507 F.2d 461 (2d Cir. 1974) is dispositive. *Michel*

---

* Sze's failure to submit an affidavit from his former counsel corroborating his allegations that he was promised he would neither go to jail nor be deported if he pled guilty independently justified Judge Brieant's denial of the motion without hearing. *United States* v. *Santelises*, 476 F.2d 787, 790 n.3 (2d Cir. 1973); *Grant* v. *United States*, 451 F.2d 931, 933 (2d Cir. 1971).

** This Court's decision in *Seiller*, *supra*, also emphasizes that the District Court is not required to hold a hearing to test the veracity of such a claim. Slip op. at 6536.

reaffirmed as the law of this Circuit the long standing rule of *United States* v. *Parrino*, 212 F.2d 919 (2d Cir.), *cert. denied*, 348 U.S. 840 (1954), "that even where a defendant has been erroneously advised by counsel that his plea would not result in deportation, no 'manifest injustice' within Fed.R.Crim.P. 32(d) would occur in the denial of a motion to withdraw a plea of guilty." 507 F.2d at 464. *See also United States* v. *Santelises*, 476 F.2d 787 (2d Cir. 1973). Explaining that in *Parrino* it had been held that deportation was a collateral rather than direct consequence of plea, writing for a unanimous Court in *Michel*, Judge Mulligan went on to state that where a "client is an alien, counsel and not the court has the obligation of advising him of his particular position as a consequence of his plea." 507 F.2d at 465.*

In his final attack on the sufficiency of his plea under Rule 11, Sze contends that Judge Brieant committed reversible error by accepting his guilty plea notwithstanding denial by him of conduct sufficient to establish each of the elements of the crime of conspiracy. This argument too is meritless, as examination of the transcript of the plea proceedings discloses. Replying to the Court's inquiry as to what he did in connection with Count One, Sze said that a friend had informed him he could buy a "green card" (A. 22), that he agreed with co-defendant Eddie Chow to offer money to immigration officers for green cards for other persons (A. 23) and that he went to the Jade Chalet Bar on May 20, 1974 to buy a "green card" from the immigration officers for himself. (A. 23). Subsequently, in response to questions from the Assistant United States Attorney, Sze admitted *in English* that he introduced a friend, Pang Sing Ping, to Eddie Chow, telling Ping that Eddie Chow would "take care of everything", for the purpose of enabling Ping to purchase a

* In addition, of course, Sze's immigration status was made crystal clear to him at the time of his sentence (*see* A. 34-38), and he nonetheless did not move to withdraw his plea until more than a year later.

green card through Chow from the immigration officers. (A. 26-27).

That Sze alleges that he was unaware that this conduct on his part was illegal * or that it constituted, among other crimes, conspiracy to commit bribery is not only contrary to Sze's express statements at his guilty plea,** but is irrelevant. What is significant is that Sze acknowledged acts sufficient to justify Judge Brieant in concluding that Sze and others had entered into an agreement corruptly to give, offer and promise "things of value" to officers of the Immigration and Naturalization Service to influence the latter in the performance of their official acts, to commit and aid in committing, and collude in, and allow a fraud to be committed against the United States and an agency thereof in the performance of lawful governmental functions, and to induce them to do and omit to do acts in violation of their lawful duties as charged in Count One of the indictment, and that at least one overt act in furtherance of that agreement had been performed by one of the co-conspirators. No more was required, and Judge Brieant correctly determined that Sze's plea had an adequate basis in fact *** as well as in law. *Seiller* v. *United States, supra; Kloner* v. *United States*, Dkt. No. 75-2136 (2d Cir., May 10, 1976), Slip op. 3661, 3666.

---

* Sze's denial of guilty knowledge was hardly persuasive. When asked at sentence if he had anything to say in his own behalf, Sze remarked: "I am sorry I have been involved in a thing which is against my own wish. *I know I am wrong.*" (A. 34; emphasis is supplied).

** In response to the question whether he was pleading guilty solely because he believed he was guilty, Sze replied "I feel this way myself." (A. 21).

*** In assessing the factual basis for the plea, Judge Brieant was also entitled to consider the detailed recital on the record of what the Government expected to prove at trial regarding the existence of and Sze's participation in the conspiracy charged in Count One. *United States* v. *Navedo*, 516 F.2d 293, 298 n.10 (2d Cir. 1975); *Irizarry* v. *United States*, 508 F.2d 960, 967 (2d Cir. 1974).

## B. The interpreter services provided Sze were sufficient to facilitate his understanding of the plea proceedings.

Sze next urges that he should have been permitted to withdraw his guilty plea because the interpreter services provided him during the proceedings of March 21, 1975, when he pled guilty, were so deficient that he was unable to comprehend the proceedings and, consequently, was denied due process of law. This claim is wholly without factual basis, as Judge Brieant found. (A. 9). Unless this determination is clearly erroneous, it is not to be disturbed on review. *See United States* v. *Eucker*, Dkt. No. 75-1246 (2d Cir., July 2, 1976), Slip op. 4737, 4739; *United States* v. *Rich*, *supra*, 516 F.2d at 862; *United States* v. *Lombardozzi*, 436 F.2d 878 (2d Cir.), *cert. denied*, 402 U.S. 908 (1971); *United States* v. *Giuliano*, 348 F.2d 217 (2d Cir.), *cert. denied*, 382 U.S. 946 (1965). *See also Chee* v. *United States*, 449 F.2d 747, 748 (7th Cir. 1971) ("trial court has broad discretion in determining the fitness and qualifications of interpreters"). However, as will be shown, the District Court's ruling on this issue is amply supported in the record.

In his memorandum decision denying Sze's motion, the District Judge, referring to the March 21, 1975 plea proceeding, observed:

> "Defendant answered many of the questions in English directly to the Court. Our transcript speaks for itself. Although this 29 year old native of China stated to the Court that he did not speak 'too much' English, he also stated that he was a self-employed manager of a shoe repair store. In this position one must deal with the public, the landlord, the suppliers, taxing author-

> ities, insurers and machine servicemen. While notions of a complex nature such as 'conspiracy' and 'fraud' may require the services of an interpreter, it was clear to the Court that defendant spoke fairly fluent English." (A. 8-9).

Judge Brieant also remarked that in addition to giving answers to many of the questions in English without the assistance of the interpreter (*see* A. 27-28), even Sze's answers given in Chinese through the interpreter demonstrated a clear comprehension of the charges against him and of the proceedings. (A. 10). Indeed, examination of the transcript of the plea-taking discloses that Sze's answers to each of the questions put to him, first by the Judge and, later, by the prosecutor--whether in Chinese or English—were fully responsive, a remarkable accomplishment for someone, on the one hand, insisting on the services of an interpreter and, on the other, claiming that the interpreter was not competent. Surely Judge Brieant was entitled to consider such evident and consistent responsiveness as added indicia of Sze's total contemporaneous comprehension of the plea proceedings. *See Seiller* v. *United States*, *supra*, Slip op. at 6526; *Orosco* v. *Cox*, 359 F.2d 764, 765 (10th Cir. 1966); *Cervantes* v. *Cox*, 350 F.2d 855 (10th Cir. 1965); *Josende* v. *United States*, 345 F. Supp. 741, 742 (N.D. Ill. 1972). *See also United States* v. *Diaz Berrios*, 441 F.2d 1125, 1126-27 (2d Cir. 1971).

The foregoing, we respectfully submit, amply demonstrates that although English was not his mother tongue, Hui Sing Sze possessed decidedly more than a passing acquaintance with the English language and that Judge Brieant acted out of an abundance of caution in providing any interpreter services at all at the time the

plea was taken.* *See United States* v. *Lozano*, 511 F.2d 1, 6 (7th Cir.), *cert. denied*, 423 U.S. 850 (1975). Moreover, even assuming *arguendo* that Sze required the services of a Chinese interpreter, the arrangements which were provided at both the plea and sentence hearings passed constitutional muster. *See United States* v. *DeJesus Boria*, 518 F.2d 368, 370-71 (1st Cir. 1975); *United*

---

* While Sze argues in his brief (p. 10) that Judge Brieant "took judicial notice" of his need for an interpreter, this argument simply cannot stand in the face of the statement by Judge Brieant to Sze during the plea proceeding that "You understand pretty much English, don't you?" (A. 27) and the judge's finding in his memorandum decision that "it was clear to the Court that the defendant spoke fairly fluent English." (A. 9). Furthermore, far from sustaining Sze's claim that he was denied competent interpreter services, the District Judge's remark to Sze during the plea proceeding that "I think your English is better than the Chinese you are getting secondhand" (A. 27) is additional support for his finding that Sze spoke and understood English well enough on his own to have done entirely without an interpreter. Similarly, the Judge's request to the interpreter to accompany Sze to the probation office "in case *they* can't understand *him*" (A. 28; emphasis supplied) is merely further indication of the Court's view that Sze sufficiently understood English; the interpreter being already present and available, and having attended the plea proceeding, the obvious motivation for the request that she go with Sze to probation was to facilitate the interviewing probation officer's ready comprehension of Sze's personal situation and the circumstances of the crime he had just admitted committing. It strains logic for Sze to argue (Brief, p. 11) that although Judge Brieant "acknowledged the incompetance [sic] of the interpreter", he nevertheless requested that she continue to render her services to the agency of the court which would be conducting a comprehensive pre-sentence investigation and rendering a report to Judge Brieant to assist him in passing sentence. Nor does the interpreter's occasional transposition of Sze's remarks from the first to third person establish incompetence. *United States* v. *Guerra*, 334 F.2d 138, 143 (2d Cir.), *cert. denied*, 379 U.S. 936 (1964).

*States* v. *Valdivieso*, 486 F.2d 545, 547 (5th Cir. 1973), *cert. denied*, 416 U.S. 971 (1974).

In any event, any lingering doubts concerning Sze's complete failure to establish his burden of demonstrating manifest injustice as a result of his claimed labored communication with the interpreter (*see* A. 50-51) fade away when Sze's moving affidavit is considered. Not only did Sze admit in that affidavit that he in fact spoke English (A. 50), but the affidavit itself, written as it was in flawless English and, presumably, sworn to in English before the notary public, was compelling evidence that he also understood spoken and written English.* Likewise significant was the circumstance that at no time during the plea proceedings did Sze or his counsel register complaint concerning the translation services being furnished. Indeed, satisfaction with the services of the allegedly "incompetent" interpreter was so substantial, and Judge Brieant so found (*see* A. 11), that when presumably "competent" interpreter services were provided on May 2, 1975 at the time of sentence, Sze did not see fit to register retroactive complaint concerning the interpreter provided him at the time of the plea.

In these circumstances, Sze's claim concerning the adequacy of his comprehension of the plea proceedings resulting from incompetent interpreter services, aside from being without any merit whatsoever, was untimely as well. *See United States* v. *Lozano*, *supra*, 511 F.2d at 6; *United States* v. *Gonzalez*, 33 F.R.D. 276, 279 (S.D. N.Y. 1958) (Kaufman, J.).

---

* At the very least, Sze's belated protestations of English illiteracy—contained in an affidavit written in English—simply do not establish that Judge Brieant's careful conclusion to the contrary in his opinion is "clearly erroneous."

## CONCLUSION

**The order of the District Court should be affirmed.**

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the Southern District of New York, Attorney for the United States of America.*

IRA H. BLOCK,
FREDRICK T. DAVIS,
*Assistant United States Attorneys, Of Counsel.*

# AFFIDAVIT OF MAILING

STATE OF NEW YORK )
COUNTY OF NEW YORK) ss.:

IRA H. BLOCK, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 18th day of October, 1976, he served two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

STUART WADLER, ESQ.
450 Seventh Avenue
New York, New York 10018

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Ira H. Block
IRA H. BLOCK

Sworn to before me this

18th day of October, 1976.

Maria A. Israelian
Notary Public

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978